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No. 82-708
IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,

Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

On Writ of Certiorari to the Supreme Court of California.

BRIEF FOR RESPONDENT STATE OF CALIFORNIA.

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Questions Presented.

1. Whether petitioner's title to tide and submerged lands located within a former Mexican rancho grant is subject to a public trust easement where there is an *express reservation* of such rights in the grant of the Mexican government to petitioner's predecessors in interest, which grant was presented to and confirmed by the Board of Land Commissioners.

2. Whether petitioner's fee title, deraigned from this Mexican grant, is subject to a sovereign public trust easement in view of the fact that when petitioner's predecessors received the grant from Mexico it was subject to such rights irrespective of whether there was an express reservation as in this case, and in view of this Court's rulings that the confirmation of a title derived from a Mexican grant merely confirmed that which had been previously granted and did not determine sovereign rights in the property nor confer a new federal title.

3. Whether this Court should disturb the California Supreme Court's holding that petitioner's fee title, deraigned from a Mexican grant, is subject to a public trust easement where this Court has repeatedly ruled that the determination of the incidents of such a title does not provide a basis for the application of federal law.

4. Whether, where the confirmatory patent issued to petitioner's predecessors contains repeated references to the existence of an "inner bay" in its property description and an extensive lagoon is shown on the plat incorporated into the patent, it is a collateral attack on the patent to allow proof of the lagoon's existence to clarify the ambiguity arising when the patent is considered in light of statements made in proceedings leading to the issuance of the patent and the physical existence of the lagoon is also established by official maps of the United States and geologic data.

5. Whether this Court should disturb the California Supreme Court's determination that the State succeeded to the sovereign public trust easement over Ballona Lagoon upon its admission to the Union where this Court very early established that on statehood all later admitted states receive sovereign title interests remaining in tide and submerged lands to put them in the same position as the Original Thirteen States which created this Union.

TABLE OF CONTENTS

Page

Questions Presented i

Jurisdiction 1

Statement 1

Summary of Argument 5

Argument 8

I.

Private Titles to Tide and Submerged Lands Were Subject to a Public Trust Easement Under Mexican Law Similar to the Common Law Public Trust Easement; the California Supreme Court Merely Recognized This Fact 8

A. Summa's Title Was Subject to an Express Reservation in Favor of the Public Under Mexican Law and This Title With Its Reservation Was Confirmed by the Board of Land Commissioners 8

B. The Reservation in Favor of the Public Contained in the La Ballona Rancho Grant Included the Public Trust Easement Over Tide and Submerged Lands, According to Well Settled Principles of Mexican Law as Well as Summa's Own Expert at Trial 10

C. The Public Trust Easement Being of Such Fundamental Importance, It Was Not Even Necessary for This Public Right to Be Expressly Reserved for Private Titles to Tide and Submerged Lands to Be Subject to Such an Interest Under Mexican Law 13

Page

II.

Even Had There Not Been an Express Reservation of Public Rights in the Conveyance to Summa's Predecessors, the Public Trust Would Exist in Ballona Lagoon, Unaffected by the Confirmation Proceedings 15

A. Sovereign Rights Such as the Public Trust Were Not Within the Jurisdiction of the Board of Land Commissioners Under the Act of March 3, 1851 15

B. This Court Has Recognized That Rights in Property Arising Under a Prior Sovereign Survived the Confirmation of Private Titles 19

C. Being a Sovereign Right, No Reservation in the Confirmatory Patent Was Required to Preserve the Public Trust 21

III.

This Court Has Consistently Held That Incidents of Titles Confirmed Pursuant to the Act of March 3, 1851, Are to Be Determined According to State Law 23

A. The State Court's Determination of the Incidents of Summa's Title Should Not Be Disturbed Because the Asserted Grounds for Application of Federal Law Have Been Expressly Rejected by This Court 23

B. This Court Has Expressly Distinguished Confirmatory Patents Issued Pursuant to the Act of March 3, 1851, From Patents of the Federal Government of Public Lands Owned by the United States. Incidents of Titles Deraigned From Confirmatory Patents Are Governed by the State and Not the Federal Law 27

Page

IV.

Where There Are Repeated References to the Existence of Ballona Lagoon in the Federal Confirmatory Proceedings, It Was Proper for the Trial Court to Consider Evidence Concerning This Fact to Set At Rest Any Ambiguity Created by Other Statements Made During Those Same Proceedings 29

V.

Upon Statehood California Received Soverign Title Rights, Including the Public Trust Easement in the Portion of Ballona Lagoon Here in Issue, to Put the State in the Same Position as the Original Thirteen States 37

VI.

The "Taking" Argument Advanced by Amici Curiae CLTA and Pacific Legal Foundation ("PLF") Is Not Properly Before This Court and Therefore Should Not Be Considered 39

Conclusion 41

INDEX TO APPENDICES

Appendix 1. Copy of 1858 Hancock Survey Plat.

Appendix 2. Copy of 1876 United States Coast Survey Map.

Appendix 3. Photograph of Ballona Lagoon, Circa 1908.

Appendix 4. Note to California Coastal Commission Maps.

TABLE OF AUTHORITIES

Cases	Page
Adam v. Norris, 103 U.S. 591 (1880)	21, 27
Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 (1972)	40
Apalachicola Land & Development Co. v. McRae, 86 Fla. 393, 98 So. 505 (1923), appeal dismissed, 269 U.S. 531	6, 11, 13, 14, 15
Attorney General v. Parmeter, 10 Price 378, 147 Eng. Rep. 345 (Ex. 1811) aff'd by House of Lords sub nom. Parmeter v. Gibbs, 10 Price 412, 147 Eng. Rep. 356 (H.L. 1813)	6
Barker v. Harvey, 181 U.S. 481 (1901)	10, 18
Beard v. Federy, 70 U.S. (3 Wall.) 478 (1865)	21
Boquillas Cattle Co. v. Curtis, 213 U.S. 339 (1909)	21, 27
Carpenter v. City of Santa Monica, 63 Cal.App.2d 772, 147 P.2d 964 (1944)	23, 28
Clark v. Williard, 294 U.S. 211 (1935)	40
Clough v. Wing, 2 Ariz. 371, 17 P. 453 (1888)	11
Coyle v. Smith, 221 U.S. 559 (1911)	38
Cummings v. Chicago, 188 U.S. 410 (1903)	23
Devine v. Los Angeles, 202 U.S. 313 (1906)	24, 25, 26, 40
Dick v. United States, 208 U.S. 340 (1908)	38
Dickson v. Board of Com'rs of Caddo Levee Dist., 210 La. 121, 26 So.2d 474 (1946)	11
Eldridge v. Trezevant, 160 U.S. 452 (1896)	20, 39
F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974)	40, 41
Ferris v. Coover, 10 Cal. 589 (1858)	10, 13
Freemont v. United States, 58 U.S. 541 (1854)	17, 18

Page

Helis v. Ward, 308 U.S. 365 (1939) 40

Hooker v. Los Angeles, 188 U.S. 314 (1903)..... ..... 24, 25, 26, 40

Hyman v. State Lands Com'n of State of Cal., 543 F.Supp. 118 (C.D. Cal. 1982) appeal pending .. 26, 39

Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892) 4, 6, 13, 21, 22

Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938) 4

Irvine v. California, 347 U.S. 128 (1954) 40

J. I. Case v. Borak, 377 U.S. 426 (1964) 41

Johnson v. Manhattan Ry. Co., 289 U.S. 479 (1933) 40

Jover v. Insular Government, 221 U.S. 623 (1911) 14

Knight v. United States Land Association, 142 U.S. 161 (1891) 15, 34

Landry v. Robison, 110 Tex. 295, 219 S.W. 819 (1920) 11

Leo Sheep Co. v. United States, 440 U.S. 668 (1979) 21

Los Angeles Milling Co. v. Los Angeles, 217 U.S. 217 (1910) 24, 25, 26, 27, 40

Lux v. Haggin, 69 Cal. 255 (1886) 11

Maricopa County Municipal Water Dist. No. 1 v. Southwestern Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931) 11

Marks v. Whitney, 6 Cal.3d 251, 491 P.2d 374, 98 Cal.Rptr. 790 (1971) 5

Page

Montana v. United States, 450 U.S. 544 (1981)..... ..... 6, 16, 21, 22
Moore v. Smaw, 17 Cal. 199 (1861) 28
Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926) 11
Newcomb v. City of Newport Beach, 7 Cal.2d 393, 60 P.2d 825 (1936) 5
New Orleans v. Paine, 147 U.S. 261 (1893) 34
New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836) 17, 18, 19, 20, 39
North Dakota ex rel. Bd. of Univ. and School Lands v. Andrus, 671 F.2d 271 (8th Cir. 1982) rev'd on other grounds sub. nom. Block v. No. Dakota, 103 Sup.Ct.Rptr. 1811 (1983) 37
North Shore Boom Co. v. Nicomen Boom Co., 212 U.S. 406 (1909) 23
Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 416 (1853) 38
Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 39
Oregon v. Riverfront Protective Ass'n., 672 F.2d 792 (9th Cir. 1982) 37
Packer v. Bird, 71 Cal. 134 (1886) aff'd. 137 U.S. 661 (1891) 37
Parker v. Brown, 317 U.S. 341 (1943) 38
Pennoyer v. Neff, 95 U.S. 714 (1877) 38
People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913) 4, 5
Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845) 37, 38
Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) 21

Page

Rhode Island v. Massachusetts, 37 U.S. (12 Pet. 657 (1838)) 38

Rosborough v. Picton, 12 Tex. Civ. App. 113, 34 S.W. 791 (1896) 11

San Francisco v. LeRoy, 138 U.S. 656 (1891) 14, 15

Scott v. Ward, 13 Cal. 458 (1859) 10

Shively v. Bowlby, 152 U.S. (10 Pet.) 662, 737 (1836) 39

Skiriotes v. Florida, 313 U.S. 69 (1941) 39

State of California v. Superior Court (Fogerty), 29 Cal.3d 240, 625 P.2d 256, 172 Cal.Rptr. 713 (1981), cert. denied, 454 U.S. 865 ..... 4, 5, 40

State of California v. Superior Court (Lyon), 29 Cal.3d 210, 625 P.2d 239, 172 Cal.Rptr. 696 (1981), cert. denied, 454 U.S. 865 ..... 5, 40

Stewart v. United States, 316 U.S. 354 36

Teamsters v. United States, 431 U.S. 324 (1977) 40

Townsend v. Greeley, 72 U.S. (5 Wall.) 326 (1866) 18

United States v. Castillero, 67 U.S. (2 Black 17), 166 (1862) 17, 18

United States v. Coronado Beach Co., 255 U.S. 472 (1921) 10, 15

United States v. Holt State Bank, 270 U.S. 49 (1926) 37

United States v. Pink, 315 U.S. 203 (1942) 25

United States v. Rindge, 208 F. 611 (S.D. Cal. 1913) 21

United States v. Texas, 339 U.S. 707 (1950) 38

United States v. Title Insurance Co., 265 U.S. 472 (1924) 18

Page

United States v. Utah, 283 U.S. 64 (1931) 37

Yeast v. Pru, 292 F. 598 (1923) 27

Yeo v. Tweedy, 34 N.M. 611, 286 P. 907 (1929) 11

Constitution

United States Constitution, Tenth Amendment 39

Dictionaries

Pineda, Nuevo Dicionario, Español e Ingles e Ingles y Español (1740) 35

Webster, Webster's English Dictionary 466 (1864) 30

Miscellaneous

Annual Report of the Secretary of the Interior on the Operations of the Department 37-38 (1873) 33

Commission for Settling Private Land Claims, Regulations of the Commissioners for the Presentment and Prosecution of Claims (1852) 16, 17

Cong. Globe, 31st Cong., 2d Sess. 371, 375, 428-429 (1851) 7, 27

Las Siete Partidas, Partida III, title XXVIII, law III 5, 11, 13, 14

Las Siete Partidas, Partida III, title XXVIII, law VI 5, 11, 13, 14

Report of the Superintendent of the United States Coast Survey (1876), S. Ex. Doc. No. 37, 44th Cong., 2d Sess. 50 (1876) 30

Report of the Surveyor-General of the State of California 12 (1886-1888) 12

Speeches of Mr. Gwin of California, in the Senate of the United States, on Private Land Titles in the State of California 43 (1851) 16

Treaty of Guadalupe Hidalgo (9 Stat. 922, Art. VIII) 7, 24, 26

Page

Rules

Rules of the Supreme Court, Rule 21.1(a) 41
Rules of the Supreme Court, Rule 34.1(a) 41
Rules of the Supreme Court, Rule 36.5 41

Statutes

Act of March 3, 1851 (9 Stat. 631) ..... 7, 16, 17 ..... 18, 21, 22, 23, 24, 25, 26, 27, 28, 41
Act of March 3, 1851 (9 Stat. 631) Sec. 15 27
Act of July 1, 1864 (13 Stat. 332) 32
California Public Resources Code, Sec. 6312 5
California Statutes of 1971, Ch. 77 4

Textbooks and Treatises

Hale, Lord Chief Justice, "The *jus privatum* that is acquired by the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and the arms of the sea are affected to public use." De Jure Maris 22 6
Myers, W., & I. Swett, Trolleys to the Surf 50 (1976) 2
Note, The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 Yale L.J. 762, 763-772 (1970) 5
Note, 50 Wash. L.Rev. 777, 786 (1975) 38
Taylor, Patented Tidelands: A Naked Fee? 47 Cal.St. B.J. 420, 421 (1972) 4
1 Wiel, S.C., Water Rights in the Western States, 279-280 n.15 (1911) 27, 28

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BRIEF FOR RESPONDENT STATE OF CALIFORNIA.

JURISDICTION.

For the reasons set forth in Arguments III and V below, this Court lacks jurisdiction to consider the questions raised in the petition. Respondent therefore respectfully requests this Court to reconsider its grant of certiorari herein.

STATEMENT.

This case concerns a portion of Ballona Lagoon, an arm of the Pacific Ocean extending into what was originally known as Rancho La Ballona when California was under Mexican rule. (Pet. App. A52.) The precise portion of the lagoon which is the subject of this litigation is part of the main channel which historically connected the landward reaches of the estuary with the sea.[1] This portion of the lagoon from at least 1850 to the present has been

[1]Appended hereto is a copy of the 1858 Hancock survey plat (appendix 1) and the 1876 United States Coast Survey map (appendix 2) with the subject matter of this action colored blue for identification purposes.

covered by tidal waters and has never been filled.[2] Today, it continues to serve as a connection to the sea, now for the adjacent Venice Canals, although tidegates have been installed to prevent flooding and the subject portion of the lagoon discharges into a man-made ocean entrance known as Marina del Rey. (Pet. App. A52-A54.)

The portion of Ballona Lagoon involved in this case is approximately one mile long and 100 feet wide. It is a habitat for marine life and migratory birds, including two endangered species, and the tidewaters flowing into the lagoon are of sufficient depth to be navigated. Because of these features, the public continues to use Ballona Lagoon for fishing, clamming, birdwatching, boating and swimming, as it has since the 1800's.[3] (R.T.

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[2]Both Summa and the Solicitor General seek to have this Court believe that a marsh or wetland is the subject matter of this lawsuit and that it is illustrated by the entire "inner bay" depicted on the 1858 Hancock survey and the entire historic Ballona Lagoon and marsh depicted on the 1876 United States Coast Survey map. (See Br. of Pet. 35; Br. for U.S. 9-10 and its appendix.) In fact, however, only a portion of the channel marked "inlet" on the Hancock survey (J.A. 26, *see also* appendix 1 hereto) and shown as the mouth of the lagoon on the 1876 United States Coast Survey map (J.A. 122, *see also* appendix 2 hereto) is at issue in the instant case. No marshlands or wetlands are at issue herein; this Court has before it only *tidelands* in the form of a lagoon that has always been recognized as an arm of the sea.

[3]Appended hereto as appendix 3 is a photograph of Ballona Lagoon, circa 1908, Lagoon, circa 1908, showing a hotel and a pavilion with its grandstand for viewing boat racing on the lagoon constructed on the lagoon's edge. W. Myers & I. Swett, *Trolleys to the Surf* 50 (1976).

It is not known to respondent State why both Summa and the Solicitor General would speculate that Ballona Lagoon "may have been made navigable in the 1960's as the result of the dredging of the Marina del Rey entry channel and the installation of the motorized tidegates" (*see* Br. of Pet. 3 n. 6; Br. for U.S. 11 n. 9), when there is *nothing* in the record to suggest it. Indeed, the record proves the contrary. On the basis of the voluminous testimony adduced at trial that the public has been navigating the lagoon since the *1800's*, the trial court held, independent of its determination of the public trust issue, that such public use had resulted in the implied-in-law dedication of the lagoon to the public under state law. (Pet. App. A54-A55, A68.)

298, 299, 435-438, 443-444, 452-456, 476-477, 678, 691, 694-695, 711-712, 714, 717.)

None of the neighboring developed or undeveloped dry land areas are involved in the decision of the court below.[4] (Pet. App. A16 n. 15.)

Indeed there is no challenge to Summa's underlying fee title to the lands in question. The only question presented is whether a public trust easement exists over the subject property by virtue of its character as tide and submerged lands.[5]

The court below determined that Ballona Lagoon is impressed with a public trust easement and has been so impressed since the time, prior to the grant to Summa's predecessors in interest, when

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[4]Thus, contrary to the assertion of the California Land Title Association ("CLTA"), no "investment-backed expectations" in such areas were impaired by the state court decision. (CLTA Amicus Br. 5-6, 14, 26, 28.)

CLTA's additional assertion that the state court's decision creates instability in title to 8½ million acres of California land (CLTA Amicus Br. 5) is advocates' hyperbole. Apparently, CLTA believes that 8½ million acres of land were once confirmed to Mexican grantees, but even if so, only a small portion of this acreage was ever tidelands. Still more limiting is the fact that only that portion of ranchos that were tidelands and that are still water covered are affected by the decision below. (Pet. App. A16 n. 15.) Although no inventory of such lands has been made by the State, even CLTA concedes that the acreage would not be substantial, since it acknowledges that the "Mexican government did not regularly convey beaches, bays, or navigable rivers and lakes into private ownership." (CLTA Amicus Br. 5.)

[5]Summa has appended to its Brief of Petitioner a map which may appear to be a map prepared by the California State Lands Commission. It is not. Summa has itself created this map. The only series of state maps in existence is that of the California Coastal Commission, which maps depict that agency's jurisdiction for coastal permit purposes. As demonstrated in appendix 4 hereto, each such map bears a map note expressly stating that its purpose is merely to depict a preliminary determination of administrative jurisdiction. Summa's implication that there exists a series of State Lands Commission maps depicting "where the public trust may exist" for title purposes is false.

it was owned by Mexico.[6] (Pet. App. A8-A9.) The state high court did not impress an interest on lands that previously had not been so encumbered; rather, it merely recognized what had always been the case: That the public trust on tidelands was observed by Mexico and that when Mexico granted Rancho La Ballona to Summa's predecessors, it reserved these public rights, both expressly and by operation of law. (Pet. App. A8-A15.) The same result would have been obtained under common law. *See People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913); *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). Indeed, in California there are already more than 80,000 acres of tidelands in private ownership subject to the public trust. Taylor, *Patented Tidelands: A Naked Fee?*, 47 Cal. St. B. J. 420, 421 (1972).

Summa, as the holder of the fee title to the land, has the right to make any use of the land it sees fit in the absence of the State's exercise of the retained public trust easement.[7] *See State of California v. Superior Court (Fogerty)*, 29 Cal.3d 240, 249, 625

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[6]In addition to holding that the Ballona Lagoon tidelands are subject to the public trust, the trial court found that the owners of Ballona Lagoon had impliedly dedicated it to the public for purposes of water recreation, transportation and for the passage of fresh sea water from the Pacific Ocean through the Ballona Lagoon to the Venice Canals. (Pet. App. A68-A69.) Each of these implied-in-fact and implied-in-law easements furnishes an independent basis for affirming the judgment of the trial court on state grounds. The issue of implied dedication was not addressed by the California Supreme Court because it found that all of the uses are included within the public trust. (Pet. App. A16.) Thus, if this Court should determine that the public trust does not exist over Ballona Lagoon, it should remand the case to the California Supreme Court for disposition of these admittedly state law issues. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 109 (1938).

[7]Although Summa knows that the trial court found the *State*, not the City, to be the administrator of the public trust over Ballona Lagoon (Pet. App. A68), it would have this Court believe that the City is now attempting to exercise the trust. (Br. of Pet. 15 n. 24.) This is not true.

In addition, Summa makes the statement that Chapter 77, Statutes of California, 1917, "reflected the common understanding that areas within Mexican grants were excluded from the property received by California upon its admission to the Union." (Br. of Pet. 6 n. 10.) Yet the meaning and effect of this state statute were litigated in the trial court and Summa's argument was rejected. (Pet. App. A54, A59, A68.)

P.2d 256, 261, 172 Cal.Rptr. 713, 718-719 (1981), *cert. denied*, 454 U.S. 865; *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, 232, 625 P.2d 239, 252, 172 Cal.Rptr. 696, 709 (1981), *cert. denied*, 454 U.S. 865; *Newcomb v. City of Newport Beach*, 7 Cal.2d 393, 402, 60 P.2d 825, 829 (1936); *People v. California Fish Co.*, 166 Cal. 576, 599, 138 P. 79, 88 (1913). Where improvements have been placed or constructed on such lands by the fee title owner, the State must compensate the owner for such improvements before exercising the trust. Calif. Pub. Res. Code § 6312; *People v. California Fish Co.*, 166 Cal. 576, 599, 138 P. 79, 88 (1913).

It should be noted that the State has infrequently exercised the trust in the last 133 years.[8] *See e.g., Newcomb v. City of Newport Beach*, 7 Cal.2d 393, 401-403, 60 P.2d 825, 829-830 (1936) (where federal government also exercised its portion of the same easement). It is therefore not true that Summa can do nothing with its property. On the contrary, as far as the public trust is concerned, Summa, in common with the private owners of the other 80,000 acres of state patented tidelands subject to the public trust in California, may make any use of the property that does not conflict with public trust needs.

SUMMARY OF ARGUMENT.

The public trust has always existed over Ballona Lagoon. While under Mexican sovereignty, Mexican law impressed these tidelands with public rights similar to our own common law public trust. Las Siete Partidas, Partida III, title XXVIII, laws III, VI; J.A. 120-121.

That Mexico treated its tidelands in the same manner as a common law nation such as the United States is not remarkable; both the civil and common law systems trace their public trust doctrines to the Code of Justinian. Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 Yale L.J. 762, 763-772 (1970). And the reason for the rule is

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[8]An exercise of the public trust by the State requires public hearings and findings of necessity for commerce, navigation, fishing, or for the environmental or recreational needs of the people of the State. *See Marks v. Whitney*, 6 Cal.3d 251, 491 P.2d 374, 98 Cal.Rptr. 790 (1971).

the same — the fundamental importance of the tidelands and navigable waters to the people. As this Court noted with approval in *Illinois Central*:

> "The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement[.] . . ." *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 458 (1892).

Moreover, as this Court has recognized, the sovereign's public trust rights exist because of the *common* rights to the resource. Since it is the inherent duty of a sovereign to protect the resource for the people, control over these areas has been consistently characterized as a fundamental attribute of sovereignty, no more subject to abdication than the police power. *Montana v. United States*, 450 U.S. 544, 552 (1981); *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 453 (1892).

It is because of this duty to protect the common tidelands resource that it was very early established in England that a private grant of tidelands by the sovereign conveyed the private right (jus privatum), but reserved the public right (jus publicum) held by the Crown for his subjects.[9] *Attorney General v. Parmeter*, 10 Price 378, 147 Eng. Rep. 345 (Ex. 1811), *aff'd* by House of Lords *sub nom. Parmeter v. Gibbs*, 10 Price 412, 147 Eng. Rep. 356 (H. L. 1813). Mexico similarly established that public rights were to be reserved in a private grant of tidelands in its grant of Rancho La Ballona to Summa's predecessors in interest (*see Apalachicola Land & Development Co. v. McRae*, 86 Fla. 393, 98 So. 505 (1923), *appeal dismissed*, 269 U.S. 531; J.A. 5), and the state high court merely recognized these preexisting public rights as consistent with the common law public trust. In so doing, the state court did not "conjure up" rights, divest Summa of any

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[9]This is consistent with Lord Chief Justice Hale's seventeenth century pronouncement of the law: "The *jus privatum* that is acquired by the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and the arms of the sea are affected to public use." *De Jure Maris* 22. Compare the Solicitor General's statements regarding English law, which statements do not treat the effect on public rights of a private tidelands grant, the sole issue here. (Brief for U.S. 12-13 n. 11.)

incident of title, or depart in any way from established law.

Indeed, the state court's decision is fully in accordance with the Treaty of Guadalupe Hidalgo (9 Stat. 922; Pet. App. A90-A107) and the Act of March 3, 1851 "to ascertain and settle the private Land Claims in the State of California." 9 Stat. 631; Pet. App. A108-A114. Under the Treaty and the Act, the United States promised to confirm that which had been previously conveyed by Mexico. (Pet. App. A96, A109-A112.) Since Ballona Lagoon was impressed with the public trust under Mexican law, and the same public rights are protected by the common law, the continued existence of these rights in the lagoon was quite properly recognized below. But Summa would have this Court confer on it a quality of title higher than its predecessors were granted under Mexican law and than private parties were granted in tidelands outside ranchos under the common law, despite the fact that the Treaty of Guadalupe Hidalgo required only that property owners deriving title under Mexican law ". . . enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States." 9 Stat. 922, art. VIII; Pet. App. A96.

That no greater rights were intended to be given to property owners such as Summa is clear from the Senate debate on the Act of 1851, where Senator Berrien, a member of the Senate Judiciary Committee when it studied the Act, emphatically declared:

> "[This amendment] would have given to the citizens of California a right which they would not have enjoyed under their own Government, if that Government had continued over them, and it would have given them a right which other citizens of the United States had not enjoyed as it relates to the United States. . . . Those persons, then, neither as Mexican citizens nor as citizens of the United States, are entitled [to this right.] What is asked by this amendment? It is asked that we should give them something more than was stipulated by the treaty; something more than, as Mexican citizens, they could have enjoyed, and something more than we accord to citizens of the United States." Cong. Globe, 31st Cong., 2d Sess. 375 (1851). The amendment was defeated.

Clearly, no greater rights should be given to Summa in this case, especially since Summa's title was made subject to an

express reservation of public rights, including the public trust, and this title was confirmed by the Board of Land Commissioners. Even had there not been such an express reservation in the conveyance to Summa's predecessors, however, the public trust would exist by operation of law. This interest was unaffected by the confirmation proceedings and on statehood devolved to the State. The state high court therefore properly acknowledged the existence of the public trust, and, this holding being a state law question according to long established precedent of this Court, it should not now be disturbed.

Moreover, the state high court's acknowledgment of the existence of Ballona Lagoon as tidelands was also proper since the existence of the channel that is the subject matter of this action has never been challenged, since it is shown on all United States surveys of the coastline and since the evidence considered by the state court clarifies an ambiguity resulting when Summa's patent is read against statements made in the confirmation proceedings.

ARGUMENT.

I.

PRIVATE TITLES TO TIDE AND SUBMERGED LANDS WERE SUBJECT TO A PUBLIC TRUST EASEMENT UNDER MEXICAN LAW SIMILAR TO THE COMMON LAW PUBLIC TRUST EASEMENT; THE CALIFORNIA SUPREME COURT MERELY RECOGNIZED THIS FACT.

A. Summa's Title Was Subject to an Express Reservation in Favor of the Public Under Mexican Law and This Title With Its Reservation Was Confirmed by the Board of Land Commissioners.

On November 27, 1839, Juan B. Alvarado, constitutional Governor of the Department of the Californias, granted the land known by the name of "Ballona" to Agustin and Ignacio Machado and Felipe and Tomas Talamantes on condition that:

> "2nd. They may enclose it *without prejudice* to the traversing roads and *servitudes* . . ." (J.A. 5; emphasis added.)

The La Ballona Rancho Grant, with its conditions, was presented to the Board of Land Commissioners and confirmed by it on February 14, 1854. In its Decree of Confirmation, the Board specifically referred to the original grant for a description of that

which had been confirmed.[10] (J.A. 21.)

Likewise, the United States District Court also specifically made reference to the original Mexican grant as controlling in its opinion affirming the Board's confirmation of the La Ballona grant. (J.A. 22-23.)

At trial, Summa's own expert witness on Mexican law, Señor Federico Laffan, was asked about the significance of this condition contained in the La Ballona grant:

> "Q: In the expediente, Governor Alvarado granted Rancho Ballona to the Talamantes and Machados without prejudice to enclosing the traversing roads and servitudes. What does that mean to you?
>
> "[Señor Laffan]: Well, it represents an expression of art which appears in deeds of conveyance even today, *where rights of the public are saved in the conveyance of large tracts of land by the authorities.*
>
> "That is to say, there may have been expressly constituted rights of traverse on this land or such right and which at the time may not be known to the governor as he is writing this thing, so he is saving his ignorance." (J.A. 222; emphasis added.)

Thus, according to Summa's own expert on Mexican law, the La Ballona grant contained an express reservation of all public rights within the rancho's perimeter.[11]

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[10]Summa's bald assertion that the Board of Land Commissioners determined that Ballona Lagoon had been granted to its predecessors without any retained public interest (Br. of Pet. 22 n. 30) is discredited by its lack of any supporting authority; more importantly, it is flatly contradicted by the Decree of Confirmation itself which refers back to the original Mexican grant containing the express reservation of public rights.

[11]It matters not whether Governor Alvarado actually intended to grant the tidelands of Ballona Lagoon into private ownership or even whether he was aware of the lagoon's existence when making the grant. This reservation shows plainly that it was the policy of the Mexican government in making grants to preserve all existing public rights. If such a reservation was "boilerplate" as the Solicitor General suggests (Br. for U.S. 13), it nevertheless served an important policy support role by, as Señor Laffan put it, "saving [the Governor's] ignorance." (J.A. 222.)

The California Supreme Court reached the identical conclusion early in its review of Mexican rancho grant cases. In *Ferris v. Coover*, 10 Cal. 589 (1858), the court examined the significance of a similar "condition" contained in a Mexican land grant and held that this was not a true condition, but a "*reservation in favor of the public.*" *Id.* at 615 (emphasis added).

Again the following year, the California Supreme Court held that a Mexican land grant made subject to the condition that the grantee "inclose the premises without prejudice to the roads and easements" was not really a condition, but rather:

> ". . . the expression of the power of the grantee with a reservation of easements[.]" *Scott v. Ward*, 13 Cal. 458, 472 (1859).

From the foregoing it is clear that when Rancho La Ballona was granted "without prejudice to the . . . servitudes", it was a fee simple conveyance subject to a reservation in favor of the public.[12]

B. The Reservation in Favor of the Public Contained in the La Ballona Rancho Grant Included the Public Trust Easement Over Tide and Submerged Lands, According to Well Settled Principles of Mexican Law as Well as Summa's Own Expert at Trial.

It is clear that the reservation of public rights in the Mexican grant obtained by Summa's predecessors included the public trust over tide and submerged lands, for Mexican law recognized pub-

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[12]Summa and the Solicitor General cite *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921) and *Barker v. Harvey*, 181 U.S. 481 (1901) for the proposition that this reservation did not include public trust rights. (Br. of Pet. 16 n. 25; Br. for U.S. 14.) In *Coronado Beach Co.*, the issue before the Court was whether fee title to submerged lands could be confirmed to be in private ownership. Significantly, the United States in that case itself advised the Court that no matter what its ruling was on this issue, the lands would still be subject to the public trust:

> "Defendant's right, title or interest, if any, in the lands below high-water mark are in any view subject to the paramount *servitudes* and powers of the federal and *state governments* to protect navigation, commerce, and fishery." (255 U.S. at 482; emphasis added.)

This conclusion is consistent with this Court's observation in *Barker v. Harvey*, 181 U.S. 481, 499 (1901), that the confirmatory patentee's full control of his property should not be taken as allowing any interference with the " 'roads, cross roads, and other usages' (servidumbres)." *Id.*

lic rights in such lands similar to our common law public trust easement.

During Mexican sovereignty, Alta California's real property laws, contained in Las Siete Partidas, impressed the sea and seashore with a right of common use:

> "The things which belong in common to the creatures of this world are the following, namely; the . . . sea and its shores, for every living creature can use each of these things, according as it has need of them. For this reason every man can use the sea and its shore for fishing or for navigation, and for doing everything there which he thinks may be to his advantage." Partida III, title XXVIII, law III; J.A. 120.
>
> "Rivers, harbors, and public highways belong to all persons in common[.]" Partida III, title XXVIII, law VI; J.A. 121.

In *Lux v. Haggin*, 69 Cal. 255 (1886), the California Supreme Court interpreted the Partidas pertaining to the sea and seashore as preserving the public's right of common use therein:

> "Whatever the common use to which rivers, harbors, and public roads were subjected, the enjoyment of such use would exclude the notion of an exclusive use or occupation which must interfere with a like use by others." *Id.* at 317.

Las Siete Partidas has been similarly interpreted by courts in the states of Florida — *Apalachicola Land & Development Co. v. McRae*, 86 Fla. 393, 98 So. 505 (1923), *appeal dismissed*, 269 U.S. 531; Louisiana — *Dickson v. Board of Com'rs of Caddo Levee Dist.*, 210 La. 121, 26 So.2d 474 (1946); New Mexico — *Yeo v. Tweedy*, 34 N.M. 611, 286 P. 970 (1929); Arizona — *Clough v. Wing*, 2 Ariz. 371, 17 P. 453 (1888); *Maricopa County Municipal Water Dist. No. 1 v. Southwestern Cotton Co.*, 39 Ariz. 65, 4 P.2d 369 (1931); and Texas — *Motl v. Boyd*, 116 Tex. 82, 286 S.W. 458 (1926); *Landry v. Robison*, 110 Tex. 295, 219 S.W. 819 (1920); *Rosborough v. Picton*, 12 Tex. Civ. App. 113, 34 S.W. 791 (1896).

Moreover, early on, the State's Surveyor-General not only recognized the Partidas' rights of common use, but also acknowledged the reason for their development:

> "The inhabitants of all arid countries being impelled by their needs have, from time immemorial, given much at-

tention to the laws regulating the public or common use of flowing waters.

. . . .

"The jealous care with which the Spanish laws have from the earliest times granted such common rights as pertain to the use of waters, is shown by the 'Partidas,' which declare: 'That the "ribero del mar" (sea beach), the space between high and low tide, cannot be granted to any person, nor can the exclusive right to the use thereof be conceded to any one whomsoever; but, that all shall have a right to use the same' — in other words, that it should be reserved for public use." Report of the Surveyor-General of the State of California 12 (1886-1888).

Indeed, even Summa has conceded the Partidas' right of common use. For it was Summa, through its Mexican law expert at trial, who confirmed that Las Siete Partidas is the applicable law and that under this law the public had a property interest in tide and submerged lands:

"[Señor Laffan]: The law of Siete Partidas is the applicable law. The rules of law 3 and law 6 that we have referred to are specifically the rules which are applicable." (J.A. 220.)

"[A]ccording to these laws, the public had a property interest in the sea, seashore and in the rivers which, according to the commentators, definitely refers to running waters, to the ports and to the public roads and, as a property right is involved, therefore, the right of using these."[13] (J.A. 212.)

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[13]Summa, not surprisingly, is now attempting to distance itself from its Mexican law expert. (See Br. of Pet. 25 n. 32.) However, at trial, Summa relied on Señor Laffan to prove that Mexican law recognized public rights in tide and submerged lands, Summa's aim being to persuade the court that (1) because of these public rights a tidal waterbody would not have been granted by Mexico, and (2) having been included in a private land grant, Ballona Lagoon must not have been tidal. (*See* C.T. 359, 623.) Unfortunately for Summa, it persuaded the court on the law but not the facts. The trial court found that under Mexican law tidewaters were subject to rights of the public. It further found that Ballona Lagoon was tidal and hence subject to these public rights. (Pet. App. A52-A53.)

Moreover, Summa's Mexican law expert established that the Partidas' rights of common usage would be considered servitudes. (J.A. 222.)

Thus, when the Mexican sovereign reserved the "servitudes" in the La Ballona Rancho grant, it was a reservation of the public rights of common usage contained in Las Siete Partidas, rights which include the public trust easement over tide and submerged lands.

This conclusion is confirmed by the following reservation in *Ferris v. Coover*, 10 Cal. 589 (1858):

> "He may enclose it, without prejudice to the paths, highways, and privileges, particularly the traffic and navigation of the rivers." *Id.* at 595.

Since "navigation of the rivers," one of the rights enumerated in laws III and VI of the Partidas, is given as *one example* of the public rights reserved in the conveyance, it is clear that the public rights reserved included those contained in the Partidas, such as the public trust easement.

C. The Public Trust Easement Being of Such Fundamental Importance, It Was Not Even Necessary for This Public Right to Be Expressly Reserved for Private Titles to Tide and Submerged Lands to Be Subject to Such an Interest Under Mexican Law.

Quite apart from the express reservation in the grant to Summa's predecessors, the public rights in Ballona Lagoon would have been deemed reserved by operation of law, such was the importance of public rights in tide and submerged lands under Mexican law. Indeed, this Mexican right of common use, expressed in terms of a reservation or servitude, is quite similar to our common law public trust easement. (Compare Partida III, title XXVIII, laws III, VI with *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). And like our common law public trust, even privately owned tidelands were subject to a reservation for public use under Las Siete Partidas.

This was expressly held in *Apalachicola Land & Development Co. v. McRae*, 86 Fla. 393, 98 So. 505 (1923), where the court stated:

> "[Under Las Siete Partidas] a grant or concession of lands under navigable waters and tide lands was not in accord with usual customs of the Kingdom, such lands and waters being held as res communes for the public use; and a conveyance of them to private ownership could be consummated only by a clear showing of express sovereign intent (see *Jover y Costas v. Insular Government of the Philippine Islands*, 221 U.S. 623, 31 Sup.Ct. 664, 55 L.Ed. 844); and *even this would not exclude the public use of the lands and water and the natural products thereof*[.]" *Id.* at 433, 98 So. at 518 (emphasis added).

Again stressing that under Las Siete Partidas a private grant of tidelands reserved those same public rights which the common law terms public trust rights, the court in *Apalachicola* held:

> "[Pursuant to Las Siete Partidas if the sovereign] had granted, or had expressly authorized a grant of submerged lands below high-water mark on the bays of the sea, such a grant might under some circumstances carry a bare legal title, but not a right of private ownership in submerged lands under the waters of the bay or sea, thereby excluding navigation, fishing, the taking of oysters or other shell fish, and other purposes in which the public have an interest as of common right, subject to governmental regulation for the good of the public." 86 Fla. at 451, 98 So. at 524.

These principles are directly applicable to Ballona Lagoon. Being *tidelands*, and thus constituting part of the "sea and its shores", under Mexican law, Ballona Lagoon was held in common for the benefit of the public and was not susceptible of exclusive private use. Las Siete Partidas, Partida III, title XXVIII, laws III, VI; J.A. 120-121.

Nevertheless, as this Court has observed, both the Spanish and the Mexican sovereigns were capable of alienating such lands.[14] *Jover v. Insular Government*, 221 U.S. 623, 629 (1911); *San Francisco v. LeRoy*, 138 U.S. 656, 670-671 (1891). In view of

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[14]This is not to say that tide and submerged lands were generally alienable under Las Siete Partidas. As *Jover* so clearly instructs, a conveyance of such lands could only be had on a solid showing of express sovereign intent. *Jover v. Insular Government*, 221 U.S. 623 (1911).

these authorities, Summa's fee ownership of Ballona Lagoon has never been at issue in this litigation.[15] But this does not end the matter; it is the starting point. For under Las Siete Partidas, even privately owned tidelands remained subject to a retained public trust interest. *Apalachicola Land & Development Co. v. McRae*, 86 Fla. 393, 433, 451, 98 So. 505, 518, 524 (1923).

Although the *Apalachicola* case involved grants by the Spanish sovereign in Florida, its legal conclusions are appropriate herein because as the Solicitor General points out, "the governing law was Las Siete Partidas, the same Code invoked here as imposing a perpetual easement on the tidelands area encompassed in the Ballona Rancho grant. We reasonably may suppose that Mexico construed that provision no differently." (Br. for U.S. 15.)

Thus, we reasonably may conclude that when Mexico conveyed legal title to Ballona Lagoon, it did not thereby exclude the public rights therein. On the contrary, as discussed above, these public rights were specifically reserved in the grant to Summa's predecessors in interest.[16]

II.

EVEN HAD THERE NOT BEEN AN EXPRESS RESERVATION OF PUBLIC RIGHTS IN THE CONVEYANCE TO SUMMA'S PREDECESSORS, THE PUBLIC TRUST WOULD EXIST IN BALLONA LAGOON, UNAFFECTED BY THE CONFIRMATION PROCEEDINGS.

A. Sovereign Rights Such as the Public Trust Were Not Within the Jurisdiction of the Board of Land Commissioners Under the Act of March 3, 1851.

Under the Act of March 3, 1851, the Board of Land Commissioners was charged with investigating the validity of *private* land grants made by the prior sovereign, and, if found to be valid,

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[15]California recognizes the underlying fee title of Summa to the subject lands in accordance with prior decisions of this Court, none of which, the Solicitor General concedes (Br. for U.S. 20), dealt with the incidents of such ownership. *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921); *Knight v. United States Land Association*, 142 U.S. 161 (1891); *San Francisco v. LeRoy*, 138 U.S. 656 (1891).

[16]The Solicitor General wonders why a government would desire to preserve "wetlands that were granted out presumably because they served no public purpose." (Br. for U.S. 15.) Far from "serving no public purpose" we know from the earliest records that Ballona Lagoon

(footnote continued on following page)

ascertaining their boundaries. 9 Stat. 631. Nothing in the Senate debate on the Act of 1851, the Act, or Regulations of the Commissioners indicates that *sovereign* rights, which were never the subject of a grant by the prior sovereign, also required confirmation.[17] Indeed, this Court has consistently held that such in-

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tidelands have been used by the public for hunting, boating, fishing, clamming and recreation since the 1800's. (See, Statement, *supra*) It was for such public purposes that tidelands were preserved by force of law in nineteenth century Mexico just as they were in nineteenth century America.

[17]Both Summa (Br. of Pet. 20) and the Solicitor General (Br. for U.S. 24-25) assert that the requirement of presentation did apply to state sovereign claims. But neither cites authority that in fact supports this farfetched proposition. Indeed, all the authority is to the contrary.

In the Senate debate on the Act of 1851, it was made perfectly clear that the Congressional intent in drafting the Act was to separate those lands previously granted by Spain and Mexico from federal public domain lands so that the latter could be sold without fear of interfering with Spanish or Mexican grants. In the words of the Act's author, Senator Gwin of California:

> "Thus we have public and private property blended together in one common mass; and it is the duty of the Government to have them separated, so that bona fide claims may be respected and severed from the public domain, and the latter may be disposed of, and fee titles to the same given to our citizens without fear of conflict or interference." Speeches of Mr. Gwin, of California, in the Senate of the United States, on Private Land Titles in the State of California 43 (1851).

From this it is seen that Congress intended to convey, or at least be able to convey, all lands that were not confirmed under the 1851 Act. Since sovereign rights may not be sold (*Montana v. United States*, 450 U.S. 544, 552 (1981)), there was no need for them to be segregated; consequently, Congress simply did not envision, or provide for, the presentation of state sovereign rights under the Act. And in practice the State took no part in these proceedings.

Further, the Act itself precluded the presentation of sovereign claims. The Act provides that for *all* claims finally confirmed a patent shall issue to the claimant upon presentation to the General Land Office of a certificate of confirmation and a plat or survey of the land confirmed. (§ 13; Pet. App. A112.) The survey was to be conducted by the Surveyor-General of California, whose duty it was to cause all confirmed *private* claims to be surveyed. *Id.* Clearly it was contemplated that only private claims be presented, surveyed and confirmed by patent under the Act. Summa would have had the State obtain a private confirmatory patent for its sovereign rights.

The Regulations of the Commissioners likewise were directed to private claimants asserting a grant from Spain or Mexico, and not to

terests were simply not within the jurisdiction of the Boards. *Fremont v. United States*, 58 U.S. 541 (1854); *New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836).

In *Fremont v. United States*, 58 U.S. 541 (1854), a case challenging the confirmation of fee title to a Mexican land grant, it was argued that the confirmation was invalid because the grant contained a mine which under Mexican law belonged to the sovereign. This Court held that on appeal from a decision of the Board of Land Commissioners, the inquiry was limited to the validity of the fee title and the boundaries of the grant, the Board having *no jurisdiction* to determine whether there were any outstanding rights of *sovereignty* in the land. In this Court's words:

> ". . . The only question before the court is the validity of the title. And whether there be any mines on this land, and, if there be any, what are the rights of the sovereignty in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court, by the act of 1851." 58 U.S. at 564.

Thus, since the Board did not have jurisdiction over sovereign rights, California could not have presented a claim under the 1851 Act.

The Solicitor General states that this Court overruled *Fremont* in *United States v. Castillero*, 67 U.S. (2 Black) 17, 166-169 (1862). (Br. for U.S. 26 n. 26.) He is incorrect. In *Castillero* the grantee claimed only a mining right, not a land grant, and the question was whether a claim to a mining right was a claim to land within the meaning of the Act of March 3, 1851, and so within the jurisdiction of the Board of Land Commissioners for purposes of confirmation. This Court held that the Board did have

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sovereign rights. For example, the claimant was to provide "the dates of the original grant and of the several assignments or conveyances." Commission for Settling Private Land Claims, Regulations of the Commissioners for the Presentment and Prosecution of Claims (1852). Obviously this was not applicable to the State.

jurisdiction to determine the validity of such a claim and define its location, as any other *private claim to land*. However, *Castillero* did not purport to say that the Board had jurisdiction to determine sovereign rights, just as *Fremont* did not purport to say that a private grantee of a mine under Mexican law could not present his claim for confirmation under the Act of 1851.

Again in *Townsend v. Greeley*, 72 U.S. (5 Wall.) 326 (1866), this Court set forth the limits of the Board's jurisdiction under the 1851 Act. Again the Court held that only legal titles and boundaries were questions for determination in the confirmation proceedings. Thus, as stated above, sovereign claims could not have been presented to the Board. In the words of the Court:

> "[T]he government provided for discharging the obligation of protection cast upon it by the stipulations of the treaty [of Guadalupe Hidalgo], and at the same time for separating private lands from the public domain. By proceedings under the act [of March 3, 1851], imperfect rights — mere equitable claims — might be converted by the decrees of the board [of Land Commissioners] or courts, and the patent of the government following, into legal titles; but *whether the legal title thus secured to the patentee was to be held by him charged with any trust, was not a matter upon which either board or court was called upon to pass*. If the claim was held subject to any trust, before presentation to the board, the trust was not discharged by the confirmation and the subsequent patent. . . ." 72 U.S. (5 Wall.) at 335 (emphasis added).

From this it is seen that sovereign rights were not the subject of the proceedings to confirm private titles conveyed by prior sovereigns under the Act of 1851. Such rights were not foreclosed by the proceedings. The proceedings merely determined that the confirmed lands were not federal public domain lands available for sale or donation. Sovereign rights were thus not required to be placed before the confirmatory bodies and continued to exist by operation of law.[18]

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[18]*Barker v. Harvey*, 181 U.S. 481 (1901) and *United States v. Title Insurance Co.*, 265 U.S. 472 (1924), are not to the contrary. Both concerned Indian rights of occupancy. The Indians claimed that the 1851 Act did not require presentation of a claim to land less than a full fee, and thus their claim to a right of occupancy was not abandoned when not presented. This Court held that the Indians' claim to a right of occupancy did come within the 1851 Act, constituting a *private* claim

B. This Court Has Recognized That Public Rights in Property Arising Under a Prior Sovereign Survived the Confirmation of Private Titles.

In the leading case of *New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836), this Court acknowledged that public rights in property originating under a prior sovereign survived the change in sovereignty and the confirmation of private titles, and were entitled to the respect accorded such rights under our system of government.

In *New Orleans*, the dispute arose as a result of the fact that while Louisiana was part of Spain and France, those sovereigns had dedicated land in the City of New Orleans for public use as quays. Upon the cession of Louisiana to the United States, the federal government claimed that those public rights had been terminated by virtue of the change in sovereignty. Adding more force to the government's argument was the fact that the City had presented its claim to the Board of Land Commissioners for confirmation and the Board had rejected the claim.[19] 35 U.S. (10

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to land, and should have been presented to the Board. Their failure to do so amounted to an abandonment of their claim. 181 U.S. at 489-491; 265 U.S. at 483-485. Here, in contrast, the State claims that the public trust easement could not have been presented for confirmation, not because it is less than a full fee, but rather because the Board only had jurisdiction over *private* land claims and not *sovereign, public rights*. As to public rights there can be no abandonment. *New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836).

[19]The Solicitor General concedes that in *New Orleans* this Court recognized public rights arising under a prior sovereign notwithstanding the earlier rejection of the claim by a Board of Land Commissioners. (Br. for U.S. 19 n. 19.) However, he attempts to distinguish *New Orleans* from the instant case on the grounds that under the confirmatory scheme enacted for Louisiana, that is, the Act of March 2, 1805, the Board merely made recommendations to Congress, and thus rejection by the Board did not amount to a forfeiture of title. *Id.* This is a distinction without a difference, for Congress, on the basis of the Board's rejection, did not confirm the City's claim. Thus the result was the same, the City's claim was rejected by the confirming body — Congress. Had the claim been confirmed there would have been no lawsuit styled *New Orleans v. United States*. It may therefore be said that even though the claim was rejected by *Congress*, this Court still held that the public rights survived. All the more reason to recognize the public rights herein.

Pet.) at 711, 730-731, 733-734. On this basis, the claim was not confirmed by Congress.

Nevertheless, this Court held that because the prior sovereigns had held the land in trust for the City, after cession the land remained impressed with these public rights. And the confirmation proceedings had not terminated these rights even though an unsuccessful attempt had been made to have them confirmed. Rather, the public rights had survived the change in sovereignty and the confirmatory proceedings and were now held by the *State*. 35 U.S. (10 Pet.) at 736-737.

Likewise herein, the public rights in Ballona Lagoon originated under a prior sovereign, survived the change in sovereignty and the confirmation of private titles, and are entitled to the recognition accorded these rights by the state high court.

A further example of the recognition of a public servitude created under the rule of a prior sovereign is found in the case of *Eldridge v. Trezevant*, 160 U.S. 452 (1896). The servitude in that case allowed the State of Louisiana to construct levees across riparian property without compensation to the landowner, and was said to have arisen under the Code Napoleon. This servitude was incorporated into state law and was applied by the State to Mr. Eldridge, a federal patentee. *Id.* at 461-463.

The Court held that, although Eldridge's federal patent (an outright grant of public land owned by the United States unlike the confirmatory patent here) contained no reservation of any kind, Eldridge's title was nevertheless subject to this public right. 160 U.S. at 466-469.

Important to the instant case is that in *Eldridge* this Court acknowledged the difference between a federal patent issued upon an outright grant from the United States and a confirmatory patent, as we have here, and implicitly affirmed the principle that the quality of title possessed by a confirmatory patentee is subject to preexisting servitudes recognized by the State in which the lands are situated.

This is seen from Eldridge's argument that the servitude should not apply to his land because his title was not "derived by grant from Spain or France, or from the State . . . [but] from the United States." 160 U.S. at 466. Thus even Eldridge conceded that had

he been a confirmatory patentee, without question his title would have been subject to the public servitude recognized by the prior sovereign when the grant was made.

So, too, in the instant case, the public trust servitude applies to Summa's title because its existence in Mexico predated the original grant of Rancho La Ballona and its recognition by the State does not detract from that title.

C. Being a Sovereign Right, No Reservation in the Confirmatory Patent Was Required to Preserve the Public Trust.

Since this Court has consistently and repeatedly held that patents issued pursuant to the Act of 1851 were *not* original grants of land but were merely confirmatory of preexisting rights (*Boquillas Cattle Co. v. Curtis*, 213 U.S. 339 (1909); *Adam v. Norris*, 103 U.S. 591 (1880); *Beard v. Federy*, 70 U.S. (3 Wall.) 478 (1865)), the United States confirmatory patent could not have conveyed the public trust to Summa's predecessors as Summa asserts, thereby enhancing and expanding the title that they had received from the Mexican government. (Br. of Pet. 27.)

Indeed, sovereign rights cannot, merely by implication, be conveyed into private ownership under any circumstances. *Montana v. United States*, 450 U.S. 544, 552 (1981).

In making this argument, Summa has failed to distinguish between proprietary and sovereign rights.[20] Unlike proprietary rights, sovereign rights cannot be conveyed into private ownership. As was stated in *Illinois Central Railroad v. Illinois*, 146

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[20]Summa's citation of *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871); and *United States v. Rindge*, 208 F. 611 (S.D. Cal. 1913), for the proposition that sovereign rights could not have been silently reserved in confirmatory patents issued pursuant to the 1851 Act is evidence of its confusion. (Br. of Pet. 28-30.) *Leo Sheep Co.* and the *Rindge* case each involved an easement by necessity, a proprietary right, and in each there was found to be no necessity. 440 U.S. at 679-680; 208 F. at 620-621. In *Pumpelly*, the question was whether lands granted by the United States are protected by the constitutional prohibition against taking without payment of compensation. 80 U.S. (13 Wall.) at 182. None of these cases has anything to do with whether sovereign rights survive the issuance of a confirmatory patent; each is inapposite.

U.S. 387 (1892):

> "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Id.* at 453.

So herein, the United States could no more have conveyed the State's sovereign public trust rights in the confirmatory patent to Summa's predecessors than it could have conveyed any of the State's other sovereign rights, such as the police power or the power to tax. For like the police power and the power to tax, the public trust goes to the core of governmental power. This Court so held in *Montana v. United States*, 450 U.S. 544 (1981), when it acknowledged that:

> "[C]ontrol over the property underlying navigable waters is . . . strongly identified with the sovereign power of government[.]" *Id.* at 552.

No one argues that the United States conveyed any other sovereign right of the State in the confirmatory patent, yet the patent contains no reservations of *any* kind. The reason is that sovereign rights, including the State's public trust rights, need no express reservation in order to be retained.[21]

For his part, the Solicitor General takes the position that the sovereign public trust rights of the State were conveyed by the confirmatory patent because not expressly reserved, yet he argues that the federal navigational servitude was *not* conveyed even

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[21]This is corroborated by the purpose for the confirmation proceedings, which was to determine the validity of *private* Mexican titles and their boundaries. 9 Stat. 631 (1851); Pet. App. A108-A114. The government was not involved in determining *sovereign* rights or extinguishing them or affecting them in any way through the issuance of a confirmatory patent and did not do so.

though *not* expressly reserved.[22] Why the two sovereign rights would have a different fate he does not say.[23] (Br. for U.S. 17-19, 29.) The answer is that the two are not treated differently. Both would have survived as a matter of law.

Thus the public trust exists over Ballona Lagoon notwithstanding the issuance of the confirmatory patent.

III.

THIS COURT HAS CONSISTENTLY HELD THAT INCIDENTS OF TITLES CONFIRMED PURSUANT TO THE ACT OF MARCH 3, 1851, ARE TO BE DETERMINED ACCORDING TO STATE LAW.

A. The State Court's Determination of the Incidents of Summa's Title Should Not Be Disturbed Because the Asserted Grounds for Application of Federal Law Have Been Expressly Rejected by This Court.

This Court long ago determined that questions concerning the incidents of a Mexican confirmatory patentee's title,[24] such as those raised herein, are to be resolved by state law because no

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[22]The Solicitor General also states that the public trust easement, so far as related to navigational concerns, "would seem to merge in the federal navigational servitude." (Br. for U.S. 27.) The Solicitor General is incorrect. No matter how similar aspects of the public trust may be to the navigational servitude, there would be no merger, for this Court has held that the fact that a similar regulatory power exists in both the federal and state governments is no basis for asserting that the federal power supersedes or subsumes that of the State. *North Shore Boom Co. v. Nicomen Boom Co.*, 212 U.S. 406, 412 (1909); *Cummings v. Chicago*, 188 U.S. 410, 431 (1903). The public trust would be an a fortiori case. The public trust derives from the inherent sovereignty of the State whereas the navigational servitude derives from the Commerce Clause of the Constitution. The independent origins of the public trust would prevent it from "merging" with the navigational servitude.

[23]Indeed, even CLTA, in its amicus brief, acknowledges that the two sovereign rights ought to be treated the same way, although it arrives at the wrong conclusion. (CLTA Amicus Br. 18, n. 29.)

[24]Incidents of title are all of those rights in property possessed by the owner other than the fee title and the location of the initial boundaries. *Carpenter v. City of Santa Monica*, 63 Cal.App.2d 772, 784-787, 147 P.2d 964, 970-972 (1944).

federal issues are thereby presented. *Los Angeles Milling Co. v. Los Angeles*, 217 U.S. 217 (1910); *Devine v. Los Angeles*, 202 U.S. 313 (1906); *Hooker v. Los Angeles*, 188 U.S. 314 (1903).

Despite this Court's settled rule, Summa argues that the state high court's findings respecting the incidents of its title, deraigned from a Mexican land grant, are violative of the Treaty of Guadalupe Hidalgo, the Act of March 3, 1851, and the confirmatory patent issued to it pursuant to the Act. (Br. of Pet. 14-31.)

Yet, in *L.A. Milling*, *Hooker*, and *Devine*, this Court had before it precisely the same argument and expressly rejected the Treaty of Guadalupe Hidalgo, the Act of March 3, 1851, and the confirmatory patent as bases for the application of federal law.

Each of these cases, *L.A. Milling*, *Hooker*, and *Devine*, were quiet title actions brought to determine whether a confirmatory patent issued by the United States to a Mexican land grantee pursuant to the Act of March 3, 1851, the grant being absolute on its face, had conveyed Mexican public water rights. In each, it was conceded that fee title to the property was not at issue and that the federal confirmatory patent was silent on this point.

This Court held that the Treaty of Guadalupe Hidalgo did not supply a basis for the application of federal law to determine this question because the determination of the incidents of a Mexican confirmatory patentee's title does not challenge the validity or the meaning of the Treaty. Rather, a court is called upon only to determine the rights existing under Mexican law that the Treaty promised to protect, a state court function. 188 U.S. at 318.

Further, this Court held that the invocation of the Act of March 3, 1851, does not create a federal question in a case determining the incidents of a Mexican confirmatory patentee's title because in such a case neither the validity nor the meaning of the Act is at issue, and more importantly, because the Act did not originate federal rights or titles. The Act merely established the procedure whereby preexisting property rights would be confirmed by the United States. 202 U.S. at 337.

Finally, the existence of a confirmatory patent does not require the application of federal law because the determination of the incidents of a Mexican confirmatory patentee's title does not involve the interpretation of a federal grant. This Court held that

patents issued pursuant to the Act of March 3, 1851, are not original sources of private titles, but are merely confirmatory of rights obtained under the prior sovereign.[25] 217 U.S. at 233.

In the words of this Court:

> "In truth, the questions as to the nature and extent of complainants' titles or rights, [derived from Mexico by virtue of grants to their predecessors and confirmed by the United States through its patent], are not Federal questions, but questions of state or general law.
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> "In *Hooker v. Los Angeles, supra*, it was contended that the decision of the state court against . . . rights . . . alleged to be derived from a patent of the United States, and confirmed Mexican grants, was a decision against a title, right, privilege, or immunity claimed under the Constitution or some statute or treaty of the United States, and so reviewable here. But this court held otherwise, and we said:
>
> " 'Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law, on which the decision of the state court was final. . . .' "[26] 202 U.S. at 337.

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[25]CLTA asserts that *L.A. Milling, Hooker, and Devine* are not applicable in the present context because they were all controversies between competing holders of confirmed Mexican grants over their respective rights in waters, and thus "third persons" as to each other under the Act of March 3, 1851. (CLTA Amicus Br. 15-20.) This argument fails, however, because this Court did not base its decisions on the fact that the controversies were between competing Mexican confirmatory patentees, but rather, as noted above, on an analysis of each of the asserted sources of federal jurisdiction. This Court rejected jurisdiction in all three cases for the same reason urged here; namely, because the validity or the interpretation of neither the Treaty, the federal act nor the confirmatory patent was being challenged and because none created an independent source of title requiring interpretation under federal law. 217 U.S. at 233; 202 U.S. at 337; 188 U.S. at 318.

[26]The Solicitor General asserts that "in more recent cases" this Court has repudiated this line of authority, yet he cites only one case, *United States v. Pink*, 315 U.S. 203, 217-218 (1942). (Br. for U.S. 7 n. 2.) Such an assertion is based on a profound misunderstanding of *L.A. Milling, Hooker*, and *Devine*. In the *Pink* case, the Court merely restated the well established rule that it will review or independently determine all questions on which a *federal right* is necessarily dependent. 315 U.S. at 217. But in *L.A. Milling, Hooker*, and *Devine*, this Court specifically held that there is *no federal right* involved in determining

(footnote continued on following page)

This principle was recently reaffirmed in *Hyman v. State Lands Com'n of State of Cal.*, 543 F.Supp. 118 (C.D. Cal. 1982), *appeal pending*. *Hyman* raised the same issue that is presented here: Whether the public trust exists on tide and submerged lands located within a federally confirmed Mexican land grant. Indeed, the *Hyman* case involved the same La Ballona rancho grant, the same historic Ballona Lagoon, and the same federal confirmatory patent. And plaintiffs in *Hyman* argued precisely as does Summa here that the resolution of the issue requires the application of federal law by virtue of the Treaty of Guadalupe Hidalgo, the Act of March 3, 1851, and the federal confirmatory patent.

The federal district court disagreed and dismissed the case for lack of federal jurisdiction, citing the long-standing precedent of this Court that no federal question is involved in determining the incidents of titles confirmed by the United States under the Act of March 3, 1851. The court stated:

> "Supreme Court precedent, from 1900 to 1977, is controlling here. It is consistent in establishing the principle that no federal question is involved in determining rights to land held privately at the Mexican conquest and subsequently confirmed and patented by the United States." 543 F.Supp. at 122.

Thus the state high court's determination that Summa's title to the tidelands of Ballona Lagoon, having been granted subject to the right of common use, is still subject to those public rights today, is a proper state law decision that should not be disturbed by this Court.

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the incidents of title of a Mexican confirmatory patentee. The *Pink* case did not repudiate *L.A. Milling*, *Hooker*, and *Devine* because these cases specifically address whether the 1851 Act or the Treaty create federal rights and reject this notion, whereas *Pink* merely sets forth a general statement of law that is applicable when a federal right *is* at issue.

B. This Court Has Expressly Distinguished Confirmatory Patents Issued Pursuant to the Act of March 3, 1851, From Patents of the Federal Government of Public Lands Owned by the United States. Incidents of Titles Deraigned From Confirmatory Patents Are Governed by the State and Not the Federal Law.

It was the intention of Congress in framing the Act of March 3, 1851, that the patents issued in confirmation of Mexican land grants be recognized as confirmatory only and not as new grants. For if considered a new grant, the patent would have barred claims of third persons, rather than leaving the title as the Mexican sovereign had granted it. It was therefore the intent of Congress to provide for a quitclaim on the part of the United States in recognition of the fact that the Government was placing itself in the same position vis-a-vis the grantee as the preceding sovereign and was not granting a new federal title. Cong. Globe, 31st Cong., 2d Sess. 371, 428-429 (1851).

Summa fails to understand that this Congressional intent was embodied in the Act of March 3, 1851, in section 15 of the Act (Pet. App. A113), and as a result, patents issued to Mexican land grantees were merely a part of the confirmation proceedings and were not independent or original grants of federal rights. (Br. of Pet. 18-31.) This Court has expressly so held. Quoting from *Adam v. Norris*, 103 U.S. 591, 593 (1880), this Court stated:

> "But the United States in dealing with parties claiming under Mexican grants, lands within the territory ceded by the treaty of Mexico, *never made pretense that it was the owner of them*. When, therefore, guided by the action of the tribunals established to pass upon the validity of these alleged grants, the Government issued a patent it was in the nature of a *quitclaim — an admission that the rightful ownership had never been in the United States*, but had passed at the time of the cession to the claimant[.] . . ."
>
> "It is perhaps *more accurate* to say that the action of the United States in such cases is a *confirmation* rather than a quitclaim." *Los Angeles Milling Co. v. Los Angeles*, 217 U.S. 217, 227-228 (1910) (emphasis added); *accord*, *Boquillas Cattle Co. v. Curtis*, 213 U.S. 339, 344 (1909); *Yeast v. Pru*, 292 F. 598 (1923); *see* 1 S.C. Wiel, *Water*

Rights in the Western States, 279-280 n.-15 (1911) (noting that in *Boquillas*, this Court repudiated *Moore v. Smaw*, 17 Cal. 199 (1861)).

Thus this Court has recognized that the United States was never the owner of lands previously granted by Mexico and therefore was not granting a title by issuing a patent under the Act of March 3, 1851, but merely confirming a preexisting Mexican title.

The Mexican land grant confirmatory patent is thus radically different from a federal patent evidencing an outright grant of public lands owned by the United States. Incidents of titles deraigned from confirmatory patents are governed by the state, and not the federal law. This distinction and its effect was described by the court in *Carpenter v. City of Santa Monica*, 63 Cal.App.2d 772, 147 P.2d 964 (1944), as follows:

> "[I]f appellant claimed through a federal grant in the proper sense, there could be no doubt that the question involved would be governed by the federal and not the state law. But that rule only applies where title is derived from the United States. *In the present case appellant did not deraign title from the United States at all. The title was predicated upon a Mexican grant.* The issuance of the patent thereafter pursuant to an act of Congress was but confirmatory of the Mexican grant in performance of our government's obligations assumed under the Treaty of Guadalupe Hidalgo. The United States never had the true ownership of the property, and in no proper sense was it the grantor or the source of appellant's title. . . ." 63 Cal.App.2d at 784, 147 P.2d at 970 (emphasis added).

Since the patent in the case at bar is a Mexican confirmatory patent and not a federal grant, it may be categorically stated that the United States never had the true ownership of Ballona Lagoon and in no sense was it the grantor or source of Summa's title. There is thus no basis for the application of federal law herein, and the decision of the California Supreme Court ought to stand undisturbed.

IV.

WHERE THERE ARE REPEATED REFERENCES TO THE EXISTENCE OF BALLONA LAGOON IN THE FEDERAL CONFIRMATORY PROCEEDINGS, IT WAS PROPER FOR THE TRIAL COURT TO CONSIDER EVIDENCE CONCERNING THIS FACT TO SET AT REST ANY AMBIGUITY CREATED BY OTHER STATEMENTS MADE DURING THOSE SAME PROCEEDINGS.

Petitioner seeks to have this Court close its eyes to the physical fact regarding the existence of Ballona Lagoon. It argues that the lagoon was found not to exist in the federal confirmatory proceedings despite its being shown on the plat incorporated in the confirmatory patent and despite repeated references to the lagoon in the description of the rancho finally approved. (Br. of Pet. 31-37.)

The portion of Ballona Lagoon which is the subject of this action is an arm of the sea today and has existed at its present location parallel to the sea and emptying into it for at least 900 years. (Pet. App. A52; J.A. 172-174, 190-193.)

Ballona Lagoon's historic existence cannot be seriously denied. It is described as the "mouth of the estuary" in five affidavits sworn in 1840 and made a part of the espediente for Rancho La Ballona. (J.A. 12-18.) It is depicted on the earliest map of the area, the Hancock survey of 1858, as a portion of the feature Hancock termed an "inner bay," specifically, that portion labeled "inlet" flowing into the sea. (J.A. 26, 170-171, *see also* appendix 1 hereto.) Indeed, since the field notes of the Hancock survey are incorporated into Summa's confirmatory patent word for word, and the Hancock survey plat is also incorporated into the patent, Ballona Lagoon's existence is memorialized in Summa's own patent. (Pet. App. A115-A124.)

The lagoon is also depicted on each of the official surveys of the area conducted by the United States in 1876, 1887, 1896 and 1934. On each of these maps, the subject of this litigation is easily identified as a portion of the long channel open to the sea. As can be seen from these maps, the historic Ballona Lagoon was much more extensive than the Ballona Lagoon we deal with

here.[27] (J.A. 122-125, 171, *see also* appendix 2 hereto.)

At trial the expert testimony of a geomorphologist and a geologist was admitted to prove that the subject of this litigation, the Ballona Lagoon of today, was naturally formed, was and is a part of the Pacific Ocean and thus tidal, and has existed in its present location for at least 900 years. The experts based their conclusions in part on the depiction of the present day Ballona Lagoon on the United States surveys of 1876, 1887 and 1896, photographs of the lagoon and age dating experiments from core samples of the lagoon's subsurface. (J.A. 126-134, 143-156, 162-174, 180-193.)

Significantly, Summa did not object to the admission of this testimony at trial, although petitioner now objects that it was considered, and did not produce any evidence to the contrary. Thus, as a matter of scientific fact, the existence of Ballona Lagoon in the nineteenth century is unrebutted, indeed, unchallenged on the record now before this Court.

Nevertheless, Summa argues that the subject matter of this litigation was dry and suitable for pasturage in 1873.[28] (Br. of Pet. 31-37.) Since the channel is clearly depicted in the United

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[27]In the 1876 Report of the Superintendent of the United States Coast Survey, Ballona Lagoon is referred to as a "large estuary." S. Ex. Doc. No. 37, 44th Cong., 2d Sess. 50 (1876). "Estuary" was defined as ". . . an arm of the sea." Webster, *Webster's English Dictionary* 466 (1864).

[28]Although this case focuses only on the *mouth* of the estuary, the Solicitor General's attempt to bolster Summa's argument based on a confused characterization of the diseño (map) (J.A. 7) must be set straight. The Solicitor General states that most of the estuary ("estero") depicted on the diseño (map) of the rancho is color coded as "grazing" land, suggesting, according to the Solicitor General, "very shallow wetlands of limited salinity." (Br. for U.S. 8.) The Solicitor General cites as authority for this proposition Commissioner Wilson's observation that on the diseño, the "grazing" land is "shaded green and marked 'Tierras de Siembra' (cultivated lands)." (J.A. 32.) A look at the diseño quickly reveals that the grazing land, "Tierras de Siembra" that Wilson was referring to is on the *eastern* end of the rancho, nowhere near the estuary. Thus the Solicitor General is plainly wrong in characterizing the estuary as grazing land and his conclusions about its character cannot be given credence.

States Coast Survey map of 1876, this argument is irreconcilable with reality. A fully developed coastal lagoon system such as that depicted by United States surveyors in 1876 could not have come into existence in just three years.[29]

Summa bases its argument on a misunderstanding of the General Land Office's review of the Hancock survey in the 1800's.

Under the 1851 Act, a confirmed private claim was required to be surveyed before a confirmatory patent could issue. (§ 13; App. Pet. A112.) The Surveyor-General was charged with conducting the surveys required under the Act and certifying them as accurate. *Id.* In compliance with this requirement, a survey of Rancho La Ballona was made by Henry Hancock, Deputy Surveyor, in July 1858. (J.A. 26, 27-31.)

Hancock's survey located on the ground the La Ballona rancho boundaries previously confirmed by the United States District Court. (J.A. 22-23.) When completed, the survey included within the boundaries of the rancho a feature Hancock termed an "inner bay." (J.A. 26.) The field notes describe how Hancock followed the shore of this bay, *crossed the bay's inlet*, and finally came to the shore of the Pacific Ocean. (J.A. 28-29.) It is important to note that it is a portion of this *inlet* that is today known as Ballona Lagoon and that is involved herein. (*See* appendix 1 hereto.)

Hancock's survey was sent to the General Land Office for approval. On March 17, 1860, Joseph S. Wilson, Commissioner of the General Land Office, rejected the survey for, *inter alia*, including the "inner bay." (J.A. 32-34.) Wilson believed that

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[29]The Solicitor General accepts the United States Coast Survey map of 1876 as the most reliable depiction of the mid-nineteenth century lagoon. (Br. for U.S. 10.) However, he is apparently confused about the subject matter of this litigation, for he expresses concern about the existence of salt marsh and mud flats on the map, pointing out that "all the area surrounding the marsh is upland, *except at the bottom of the map, where a water channel intervenes before the barrier beach and the sea.*" (Br. for U.S. 10 n. 8; emphasis added.) He notes that this channel has a low water line. *Id.* Apparently the Solicitor General does not realize that it is *only* a portion of this *tidal channel* at the bottom of the 1876 map that is now before this Court. (*See* appendix 2 hereto.)

the "inner bay" was not depicted on the original diseño. Had there been an intention to include such a feature in the rancho, Wilson wrote, it would have been more particularly described both in the diseño and in the juridical possession. (J.A. 32-33.) Noting that the diseño showed a creek flowing across the western boundary of the rancho, Wilson referred back to the Hancock survey and saw that it showed a creek flowing into the "inner bay." He therefore reasoned that the landward shore of the "inner bay" must have been intended as the rancho's western boundary. (J.A. 33.) Wilson therefore remanded the survey for amendment. (J.A. 34.)

Eight years later the survey had not been amended and no further action had been taken with respect to it. (J.A. 35-36.) It was then determined by the Secretary of the Interior that the Ballona survey came within the Act of July 1, 1864 (13 Stat. 332), and should be readvertised. (J.A. 37, 38.)

As a result of the readvertisement, a protest was filed by the owners of Rancho San Vicente y Santa Monica, the rancho abutting Rancho La Ballona on the north. Their objection was that the northern boundary of the La Ballona survey encroached into their rancho by not correctly locating the "deep gullies," the La Ballona rancho's northwestern corner. (J.A. 39-41.)

Thereafter, Tomás Talamantes and Ignacio Machado, both Rancho La Ballona grantees, submitted their own affidavits and that of Jose del Carmen Sepulveda in support of the Hancock survey. (J.A. 55-60.) The affidavits primarily concerned the location of the points fixing the northern boundary of the rancho, but they also spoke of the "inner bay." The affidavit of Ignacio Machado is illustrative:

> "[A]t this time *nearly* all of the land represented as an 'inner bay' is dry land, and is used as pasturage." (J.A. 60; emphasis added.)

Along with these affidavits, the La Ballona grantees also submitted the affidavit of Henry Hancock. Significantly, although the surveyor was the only person in the position to explain what he meant by "inner bay," his affidavit did not even mention the "inner bay." (J.A. 61-62.) It should be noted that at the time of these proceedings Henry Hancock was the law partner of Charles H. Larrabee, the attorney representing the Rancho La Ballona

grantees. (J.A. 54, 63, 74-75, 117.)

Willis Drummond, successor to Joseph S. Wilson as Commissioner of the General Land Office, reviewed the Hancock survey in a letter dated April 30, 1873, to R. Hardenbergh, the United States Surveyor-General for California. (J.A. 84-94.) In this letter, Drummond mentioned Wilson's earlier rejection of the Hancock survey but *dismissed it as irrelevant* to the proceedings before him.[30] In Drummond's words:

> ". . . What [Wilson's] views were it is not necessary now to examine, for . . . the survey . . . was duly objected to in accordance with the provisions of . . . [the Act of July 1, 1864], and is therefore now before this office, on its merits, *without regard to any opinion expressed by this office prior to said publication*." (J.A. 86; emphasis added.)

Drummond determined that the survey was accurate in its placement of the disputed boundary. Although not necessary to his decision, he then went on to say, on the one hand, that the "inner bay is not an arm of the sea[31] and [on the other hand] that the *mouth of this estero* is wholly outside the present survey of

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[30]Summa and the Solicitor General imply, without foundation, that Hardenbergh's *December* 1873 letter to Drummond discussing Wilson's concerns (J.A. 110-112) somehow influenced Drummond's *April* 1873 letter to Hardenbergh. (Br. of Pet. 33; Br. for U.S. 21-22 n. 22.) Summa can only say that although Hardenbergh's letter is clearly dated December 18, 1873 "the year clearly should have been 1872." (Br. of Pet. 33 n. 37.) This is desperate advocacy. There is nothing to suggest that the letter's date is anything other than that appearing on the face of the letter. Moreover, Drummond surely would have mentioned the views of the Surveyor-General for California if they previously had been conveyed, if for no other reason than to dismiss them as irrelevant, as he had Wilson's concerns.

[31]Drummond's statement was based on the La Ballona grantees' affidavits which they had submitted on their own behalf. (J.A. 55-60, 88-90.) Significantly, in August 1872, Commissioner Drummond determined that such ex parte affidavits were unreliable and insufficient as proof of any matter and would no longer be accepted by the General Land Office. Drummond held that henceforth affidavits would have to be sworn before the Surveyor-General and an opportunity given for cross-examination. Annual Report of the Secretary of the Interior on the Operations of the Department 37-38 (1873).

the Ballona rancho[.]" (J.A. 92; emphasis added.) Drummond added that had anyone objected to the southwest boundary, it "might have been extended, according to the final decree on title to the *mouth of the estero* above mentioned, that is to say to where it *empties into the ocean*." (J.A. 93; emphasis added.) Drummond did not order any changes to be made to the Hancock field notes or plat. The survey was approved as drawn.

On June 9, 1873, the Rancho San Vicente y Santa Monica grantees appealed Drummond's decision to the Secretary of the Interior. (J.A. 95-99.)

On November 19, 1873, Secretary of the Interior Delano issued his opinion. Secretary Delano's opinion *superseded* that of Drummond and constituted the final action on the survey. As was stated in *New Orleans v. Paine*, 147 U.S. 261 (1893):

> "Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review . . . as are the interlocutory decrees of a court open to review upon the final hearing." *Id.* at 266.

Thus it was Secretary Delano's opinion that provided the basis for the issuance of the confirmatory patent for Rancho La Ballona. *Id.*, *see also Knight v. United States Land Association*, 142 U.S. 161, 177-179 (1891).

Secretary Delano considered *only* whether the Hancock survey had correctly located the northwestern and northeastern boundaries of Rancho La Ballona according to the landmarks called for in the Decree of Confirmation. Satisfied that these landmarks were correctly located by Hancock, Secretary Delano approved the survey and plat, including their description and depiction of the "inner bay." Secretary Delano's opinion held:

> "[T]he weight of evidence establishes the correctness of the survey now before me, in its location of the northern (or northwestern) line of the Ballona, according to the decree of confirmation. That decree establishes the boundary in question from point to point by reference to natural monuments, and I am satisfied that these monuments are correctly located by the Hancock survey." (J.A. 100.)

Thus Drummond's intermediate decision was affirmed, but only on the ground of the boundary location and not on the character of the lands shown as an "inner bay" on Hancock's

plat. Neither the Hancock survey field notes with references to the bay, nor his plat depicting the "inner bay" were changed. On the contrary, the patent for Rancho La Ballona incorporated the Hancock field notes with its references to the bay and the plat depicting the "inner bay" as the rancho property description. (J.A. 101-109.)

Summa fails to understand that the character of the "inner bay" was not at issue in the private boundary dispute.[32] Whether the "inner bay" was wet or dry would not have changed the determination of whether Hancock had correctly located the "deep gullies" on the northwest corner of the rancho. Had the objections of the Rancho San Vicente y Santa Monica grantees prevailed, the Rancho La Ballona boundary would have been moved farther south, giving the San Vicente grantees more land and the La Ballona grantees less. As the Solicitor General correctly points out, "The survey was approved for its plotted boundaries, not the irrelevant sketch of an internal feature." (Br. for U.S. 22.)

Summa further fails to understand that throughout the proceedings in the General Land Office it was never stated or held that the feature labeled the "inlet" on the Hancock survey, the only part of the historic lagoon of concern in this case, was not tidelands. For example, the affidavit of Ignacio Machado, quoted by Summa (Br. of Pet. 32-33), states that *nearly* all the land represented by the "inner bay" is dry land. (J.A. 60.) Obviously, Machado knew that some of it was not dry. And Drummond acknowledged that the "*mouth* of the *estero* . . . empties into the ocean."[33] (J.A. 93; emphasis added.) It is this "inlet" and not the "inner bay" to the east of the "inlet" that is the subject matter of this case.

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[32]Even Commissioner Wilson, who would have omitted the "inner bay," would have done so only because he did not see it drawn on the diseño and therefore did not think it was meant to be included within the rancho. (J.A. 33.)

[33]This is consistent with the definition of "estero" given at trial: "an estuary or inlet" (J.A. 138), and the dictionary definition: "a place where the tide ebbs and flows, . . . an inlet of the sea." Pineda, *Nuevo Dicionario, Español e Ingles e Ingles y Español* (1740).

Thus even if the "inner bay" was not an arm of the sea, it does not affect the subject of this litigation, more properly described as "inlet" on the Hancock survey and "mouth of the estero" by Drummond.

However, because of the ambiguity resulting from Drummond's statements read against the patent's incorporation of the Hancock field notes and plat, the state high court held that scientific evidence had been properly admitted at trial to determine the historic character of what is today known as Ballona Lagoon. (Pet. App. A7.) This in no way constitutes an attack on the patent or any determination made in the General Land Office. The admission of such evidence has been specifically approved by this Court:

> "[T]o explain the meaning and extent of a decree is not to attack it for error, but to reconcile all of the descriptive language used to designate the tract title to which is confirmed.
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> "We are of the opinion that the evidence in question was of probative value [and] that its reception and consideration did not run counter to the rule that the decree of confirmation was not open to attack by reason of erroneous description of the land confirmed. . . ." *Stewart v. United States*, 316 U.S. 354, 363.

Indeed, the testimony received proves this principle, for, as demonstrated below, it reconciled and harmonized Drummond's statements and the Rancho La Ballona patent with respect to the property at issue in this case:

> Dr. Orme: "My opinion is that [this] channel . . . suggested as existing in 1839 and shown in the [Hancock survey in the] 1850's [and on United States maps in] the 1870's, 1880's, is in fact still represented at the present time by the remnant of the channel that lies to the northwest of the entrance to Marina Del Rey, and is *presently designated as Ballona Lagoon*." (J.A. 172; emphasis added.)

Factually in accord is Commissioner Drummond's statement that whereas the "inner bay" was dry, the channel or "mouth of the estero" "*emptie[d] into the ocean*." (J.A. 93; emphasis added.)

The state court's holding that the present day Ballona Lagoon is an arm of the sea thus cannot be said to be a collateral attack on a Land Office determination. Summa's argument to the contrary (Br. of Pet. 31-37) therefore must fail.

V.

UPON STATEHOOD CALIFORNIA RECEIVED SOVEREIGN TITLE RIGHTS, INCLUDING THE PUBLIC TRUST EASEMENT IN THE PORTION OF BALLONA LAGOON HERE IN ISSUE, TO PUT THE STATE IN THE SAME POSITION AS THE ORIGINAL THIRTEEN STATES.

During Mexican sovereignty, the public trust easement in Ballona Lagoon was held by Mexico. After the cession of California to the United States and California's admission to the Union, this sovereign interest passed to the State as succeeding sovereign. The court below therefore correctly identified the State as the holder of the public trust easement over Ballona Lagoon, in accord with prior decisions of this Court respecting state sovereign rights.

In *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845)[34] this Court stated that when new states were formed out of the

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[34]As *Summa* concedes (Br. of Pet. 9), under *Pollard's Lessee*, all sovereign rights in the beds of *tidal* waters accrue to a State upon its admission to the Union. Since we deal here only with *tidal* waters, all sovereign rights (here the public trust easement) in Ballona Lagoon accrued to California on statehood. There is no question that Ballona Lagoon is the type of waters in which States have a sovereign interest. It is not a discrete waterway; it is an extension of the Pacific Ocean. Since the waters of Ballona Lagoon constitute a part of this navigable sea, Ballona Lagoon must also be considered navigable, being as much a part of the Pacific as the open sea and all other coastal tidelands. There is but one Pacific Ocean and Ballona Lagoon is a part of it. *See Packer v. Bird*, 71 Cal. 134, 135 (1886), *aff'd.* 137 U.S. 661 (1891). For this reason no evidence of navigability in fact was necessary and none was presented at trial. However, the State is confident that Ballona Lagoon could meet such a test, being at least six feet deep at mean high tide at midchannel. (Summa points out that the lagoon is one to six feet deep (Br. of Pet. 3), the one foot depth being at the shores.) The following cases would support a finding of navigability in such a situation. *United States v. Holt State Bank*, 270 U.S. 49 (1926); *United States v. Utah*, 283 U.S. 64 (1931); *Oregon v. Riverfront Protection Ass'n.*, 672 F.2d 792 (9th Cir. 1982); *North Dakota ex rel. Bd. of Univ. etc. v. Andrus*, 671 F.2d 271 (8th Cir. 1982) *rev'd on other grounds sub nom. Block v. N.D. ex rel. Bd. of University & Sch. Lands*, 103 S.Ct. 1811 (1983).

federal territories, they were "admitted into the Union on an equal footing with the Original States. . . ." *Id.* at 229. Since that time, the Equal Footing Doctrine has served only one function, to delimit the peripheries of State and national sovereignty by drawing lines forbidding the intrusion of one into the exclusive province of the other. Thus, the Equal Footing Doctrine prohibits the federal government from creating new States that are any less sovereign than those already members of the Union (*Coyle v. Smith*, 221 U.S. 559 (1911), and it serves to limit State intrusions upon national sovereignty. *United States v. Texas*, 339 U.S. 707 (1950).

The Equal Footing Doctrine is not a deed from the United States, such that construction of the Equal Footing Doctrine is necessary in order to determine the extent of the rights acquired by the State upon statehood. It is plainly wrong to insist that an "interpretation" of the Equal Footing Doctrine is required as if it were a grant of land.[35] Rather, this Court has repeatedly held that upon statehood, a State's sovereignty is full and complete:

> ". . . A State upon its admission to the Union, is thereafter upon equal footing with every other State and has full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by provisions of the Federal Constitution or its own Constitution." *Dick v. United States*, 208 U.S. 340, 350 (1908); *accord, Parker v. Brown*, 317 U.S. 341, 360 (1943); *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877); *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. (16 How.) 416, 428 (1853); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 719 (1838).

Thus, the answer to Summa's question as to what rights California obtained under the Equal Footing Doctrine has already

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[35] "Grant" implies a choice on the part of the grantor to convey or not to convey. Congress had no such choice since it was powerless to withhold from new States any aspect of the sovereignty held by the Original States. Note, 50 Wash. L. Rev. 777, 786 (1975). The Solicitor General erroneously equates the Equal Footing Doctrine with a federal grant. (Br. for U.S. 7 n. 2, 19, 24.)

been answered:[36] Except for the powers committed by the Federal Constitution to the United States, the States retain their status as sovereigns and under the Equal Footing Doctrine receive all remaining powers, rights, jurisdiction and sovereignty fully and absolutely upon statehood. *Skiriotes v. Florida*, 313 U.S. 69 (1941); Tenth Amendment to U.S. Constitution.

Since under the Equal Footing Doctrine new States obtain full and complete sovereignty and jurisdiction (except for those powers delegated to the United States by the Constitution) upon their admission to the Union, and since the force of the doctrine is exhausted upon a State's admission to the Union, there is nothing about the Equal Footing Doctrine to construe. Under the force of this doctrine, on statehood, California obtained all sovereign rights remaining in the lands within its boundaries, including the public trust rights in Ballona Lagoon. This conclusion is so self-evident that its existence in this case fails to present a substantial federal question. *See Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-371 (1977); *Eldridge v. Trezevant*, 160 U.S. 452, 462-466 (1896); *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894); *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 737 (1836); *see* discussion in *Hyman v. State Lands Com'n of State of Cal.*, 543 F.Supp. 118, 121-122 (C.D. Cal. 1982), *appeal pending*.

VI.

THE "TAKING" ARGUMENT ADVANCED BY AMICI CURIAE CLTA AND PACIFIC LEGAL FOUNDATION ("PLF") IS NOT PROPERLY BEFORE THIS COURT AND THEREFORE SHOULD NOT BE CONSIDERED.

In the foregoing sections of this brief, it has been shown that the public trust easement over tide and submerged lands is a reserved public title interest which California holds in its sov-

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[36]Summa's assertion that the State received no interest in tide and submerged lands within Mexican rancho grants under the Equal Footing Doctrine (Br. of Pet. 9-10) is predicated on cases which solely concern the conclusiveness of the underlying fee title of Mexican rancho grantees. In fact, the existence of the public trust easement over tide and submerged lands within a rancho was not even addressed by the cases upon which Summa relies.

ereign capacity. (*See* Arguments I, II, V.) The exercise of such an interest is not a taking. *State of California v. Superior Court* (*Fogerty*), 29 Cal.3d 240, 249, 625 P.2d 256, 261, 172 Cal.Rptr. 713, 718-719 (1981), *cert. denied*, 454 U.S. 865; *State of California v. Superior Court* (*Lyon*), 29 Cal.3d 210, 232, 625 P.2d 239, 252, 172 Cal.Rptr. 696, 709 (1981), *cert. denied*, 454 U.S. 865.

Nevertheless, amici curiae CLTA and PLF argue that the state high court "committed a taking of private property without payment of just compensation" (PLF Amicus Br. 6-13; CLTA Amicus Br. 20-29), an issue not raised by the petition for a writ of certiorari and not raised by Summa in its brief on the merits. The issue is therefore not subject to consideration by this Court. *Teamsters v. United States*, 431 U.S. 324, 374 (1977); *Irvine v. California*, 347 U.S. 128, 129-130 (1954).

It is well settled that this Court confines itself to the grounds upon which the writ of certiorari was asked or granted, the review by this Court being no broader than that sought by petitioner. *Helis v. Ward*, 308 U.S. 365, 370 (1939); *Clark v. Williard*, 294 U.S. 211, 216 (1935); *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 494 (1933).

Apparently, amici curiae are not satisfied with the review sought by petitioner and now attempt to add new questions to this case after the grant of certiorari. This attempt by non-parties is not entitled to this Court's attention. It is improper and should be disregarded by this Court. As was stated in *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 325 (1972), "We do not reach for constitutional questions not raised by the parties." *Id.*

On this basis, the "taking" issue, not being properly before this Court, should not now be considered."[7] *F. D. Rich Co. v.*

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[7]In any event, the argument by amici curiae that the decision of the state court constituted a taking without just compensation (PLF Amicus Br. 6-13; CLTA Amicus Br. 20-29) has no basis in fact or in law. Clearly the state court's confirmation of the public trust did not deprive Summa of something it previously possessed. Rather, the court merely articulated the nature and quality of title always possessed by Summa; it did not cause a change or diminution of that title. Since Summa's title remained the same before and after the decision of the state court, there was no taking. *See Los Angeles Milling Co. v. Los Angeles*, 217 U.S. 217 (1910); *Devine v. Los Angeles*, 202 U.S. 313 (1906); *Hooker v. Los Angeles*, 188 U.S. 314 (1903).

Industrial Lumber Co., 417 U.S. 116, 121 (1974); *J. I. Case Co. v. Borak*, 377 U.S. 426, 428-429 (1964); Rules of the Supreme Court, Rules 21.1(a), 34.1(a), 36.5.

CONCLUSION.

Since this Court has long held that incidents of titles confirmed pursuant to the Act of March 3, 1851, are to be determined according to state law, and since this Court long ago settled that States receive all sovereign rights not expressly delegated to the federal government upon their admission to the Union, there is no basis for jurisdiction in this Court. Respondent State therefore respectfully requests this Court to reconsider its grant of certiorari in this case.

Nevertheless, should this Court determine to reach the merits herein, the decision of the California Supreme Court that petitioner's title to the tidelands of Ballona Lagoon is subject to an easement for commerce, navigation and fishing in favor of the public should be upheld.

Respectfully submitted,

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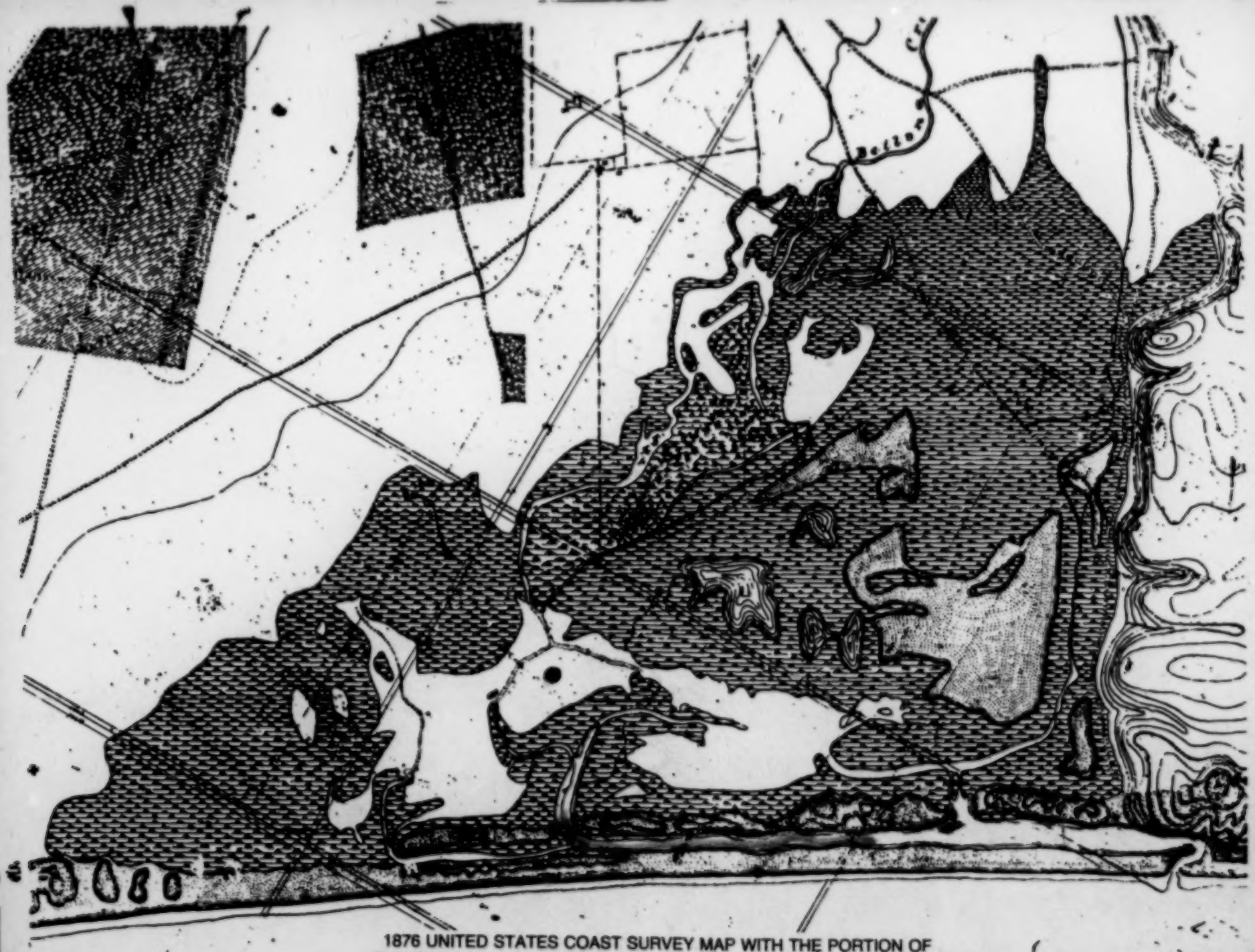
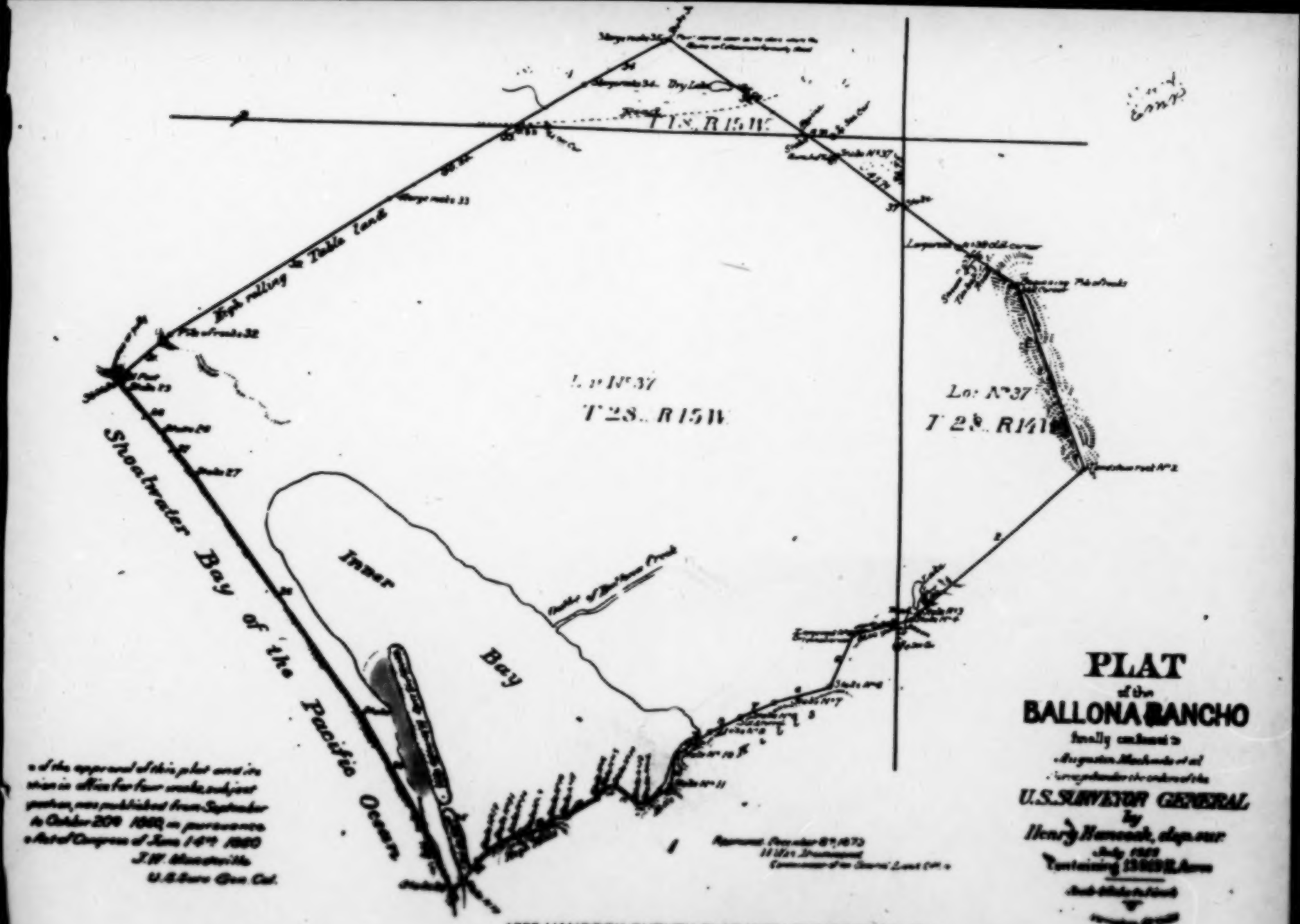
September, 1983.

APPENDIX 1.



1876 UNITED STATES COAST SURVEY MAP WITH THE PORTION OF BALLONA LAGOON WHICH IS THE SUBJECT MATTER OF THIS ACTION SHOWN IN BLUE

APPENDIX 2.



1858 HANCOCK SURVEY PLAT WITH THE PORTION OF BALLONA LAGOON WHICH IS THE SUBJECT MATTER OF THIS ACTION SHOWN IN BLUE

APPENDIX 3.

BALLONA LAGOON, CIRCA 1908.

APPENDIX 4.

NOTE TO CALIFORNIA COASTAL COMMISSION MAPS.

The lines depicted hereon only portrays [sic] a Preliminary Determination of Administration [sic] Jurisdiction to be used as an aid in determining the applicable permit jurisdiction of the local permitting agency or the State or Regional Coastal Commission upon certification of the appropriate Local Coastal Program.

These maps have been prepared to show where the public trust may exist. If an application is received for lands within the outlined area it should be referred to the State Lands Commission for a determination of whether the lands in question are in fact subject to the public trust.

This plot has not been approved by the State Lands Commission and does not establish boundary lines of any State-owned lands depicted thereon.

This plot is subject to change and may not include all lands subject to the public trust. Any questions which arise should be directed to the State Lands Commission.